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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 677 and 678

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ AND ABRAHAM M. SENDEROWITZ, INDIVIDUALLY AND AS CO-PARTNERS TRADING AS ROYAL MANUFACTURING CO.,

Petitioners,

vs.

PAUL A. PORTER, ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JULIUS M. RAPOPORT,
Counsel for Petitioners.

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Petitioners,

vs.

PAUL A. PORTER, ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION,

Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Morris H. Senderowitz, Morris Senderowitz and Abraham M. Senderowitz, individually and as co-partners trading as Royal Manufacturing Co., respectfully pray that writs of certiorari issue to review the Judgments of the United States Circuit Court of Appeals for the Third Circuit entered on August 19, 1946 (R. 43-44), reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania (R. 23), which

dismissed respondent's claim for treble damages regarding sales made by petitioners of Style Nos. 467,259 and 259(b).

Petitioners also respectfully pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit entered on August 19, 1946 (R. 43-44), affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania against the petitioners for $1,257.15 and entering an injunction against the petitioners (R. 23).

Petitioners respectfully request that this Court review the decision below.

Opinions Below

The opinion in the District Court is reported in 65 F. Supp. 548 and appears at R. 7. The opinion of the Circuit Court of Appeals for the Third Circuit has not yet been reported and will be found at page 30 of the Record.

Basis for Jurisdiction

It is competent for this Court to require by certiorari that the cause be certified to it for review pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and re-enacting Section 240(a) of the Judicial Code, 28 U. S. C. A., Sec. 347.

Questions Presented

1. Whether the Administrator has the power, ten months after an action for penal damages had been commenced, to issue an order retroactively and for the first time fixing maximum prices for commodities sold by petitioners, and under such circumstances may he recover damages in such action?

2. Where no maximum price had been fixed by the Administrator for a commodity sold by petitioners, is the Adminis-

trator's complaint demanding treble damages, served ten months before the price is fixed, fatally defective for failure to state a cause of action for overcharges on that commodity?

3. Whether Section 925(e) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 308, 50 U. S. C. A., Appendix, Sections 901 *et seq.*) which authorizes the Administrator to sue for treble damages persons selling commodities who violate a regulation prescribing a maximum price, if construed as was done by the Court below, to permit treble damages for alleged overcharges in the sale of a commodity which antedated by more than one year the fixing of the maximum price therefor, is not unconstitutional.

4. Whether Section 924 of the Emergency Price Control Act, divesting all courts except the Emergency Court of Appeals of jurisdiction to consider the validity of any regulation or order issued by the Administrator is not unconstitutional in that it deprives petitioners of their property without due process of law where it is applied in the circumstances of this case, where the order under which suit is based is issued more than a year after the sales were made and petitioners were foreclosed from attacking the validity of the order in any forum.

5. Where respondent's proof consisted of:

a) Sales by petitioners at certain prices, and

b) A copy of the Administrator's Order retroactively fixing prices below the sales prices, and issued ten months after the action was commenced,

may the Court make a finding that petitioners are wilful violators of that Order?

6. Where the Administrator's Order establishes maximum selling prices for sales to wholesalers and retailers,

should the judgment in favor of the Administrator stand, whereas here the proof merely shows that the petitioners made sales to certain named individuals and there is no proof that they are either wholesalers or retailers?

7. Where the complaint alleges that none of the sales or deliveries "was made to persons purchasing such commodities for use or consumption other than in the course of trade or business" and petitioner's answer specifically denies such allegation, may the respondent recover where no proof was offered in support of such allegation?

Statute Involved

The statute involved is the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. A., Appendix, Sections 901 *et seq.*).

Summary Statement of Matter Involved

This is a penal action arising under the Emergency Price Control Act. Respondent, hereinafter referred to as "the Administrator", is the Administrator of the Office of Price Administration. Petitioners, hereinafter referred to as "Royal", are manufacturers of men's underwear and shorts, whose annual business amounted to some $6,000,000 per year. In July, 1944, the Administrator commenced a treble damage and injunction action in the United States District Court for the Eastern District of Pennsylvania against Royal alleging damages in a sum in excess of $300,000.

The District Court awarded damages and entered judgment in the sum of $1,257.15, dismissing the balance of the claim. Both the Administrator and Royal appealed to the United States Circuit Court for the Third Circuit.

The judgment of the District Court against Royal in the sum of $1,257.15 was affirmed. The judgment of the District

Court as to the balance of the Administrator's claim was reversed by the Circuit Court of Appeals for the Third Circuit, Circuit Judges Maris, Goodrich and McLaughlin sitting, opinion by Judge Goodrich, August 19, 1946, and the cause remanded for further proceedings not inconsistent with the opinion.

The proceedings were commenced by the service of the Administrator's complaint, dated July 14, 1944, which alleged overceiling sales by Royal in violation of the General Maximum Price Regulation issued by the Administrator covering a period of one year prior to that date (July 15, 1943 to July 14, 1944).

The complaint alleged (Paragraph 6) that Royal sold and delivered garments in the course of trade or business at prices in excess of the maximum prices established therefor pursuant to the provisions of the General Maximum Price Regulation.

The complaint further alleged (Paragraph 7) that none of the sales or deliveries alleged in the complaint "was made to persons purchasing such garments for use or consumption other than in the course of trade or business".

Royal, in its answer, *inter alia,* denied the allegations of Paragraphs 6 and 7. In addition, Royal alleged as and for a separate answer and defense that if it committed any of the violations in the complaint said violations were neither wilful nor the result of failure on Royal's part to take practicable precautions against their occurrence.

No reply was served or filed by the Administrator to Royal's answer; no amended or supplemental pleading was served or filed except that Royal, on October 15, 1945, filed an amended answer. No motion was made at any time by the Administrator to conform the pleadings to the proof.

Petitioners are manufacturers of men's underwear and shorts in Allentown, Pennsylvania. All commodities sold

by them are governed by the General Maximum Price Regulation. Prior to the commencement of this action in July of 1944, they had not been charged with violation of any regulations issued by the Administrator. In June, 1944, the Administrator commenced an exhaustive investigation of Royal lasting approximately six months (S. M. P. 169). Prior to June, 1944, the Administrator had conducted at least two investigations of Royal's business (S. M. P. 171). No prior action was ever commenced against Royal by the Administrator.

In June, 1944, the Administrator's witness, Goldstein, an investigator attached to the Apparel Unit of the New York City office, was assigned to investigate Royal's business located in Allentown, Pennsylvania. He had men assigned to assist him at various stages of the investigation and, in addition, a cost accountant was assigned to the case (S. M. P. 169).

Despite this exhaustive and lengthy investigation of a firm of this size, the Administrator solely attempted to prove at the trial that his investigators found that Royal had overcharged on nine sales to one purchaser 15¢ per dozen, on one sale 12½¢ per dozen, on two sales 7¼¢ per dozen, and on one sale 2 4/5¢ per dozen (Plaintiff's Exhibit 12; S. M. P. 135). These alleged violations of General Maximum Price Regulation in one year amounted in toto to $419.05. It is apparent that these few overcharges—obviously clerical errors—in one year in a firm of this size conclusively prove Royal's complete compliance with the wartime anti-inflationary program. It would be amazing if any other firm of this size, selling so great a variety of style numbers—checked so completely—could show so few errors.

These were the sole overcharges offered by the Administrator to prove violations of the General Maximum Price Regulation.

The great bulk of the alleged overcharges ($49,192.34) which the Administrator attempted to prove were violations of a letter order issued by the Regional Administrator of the Office of Price Administration, dated May 8, 1945 (Plaintiff's Exhibit 6B; Plaintiff's Appendix, C. P. 5a), ten months after the commencement of this action, which retroactively fixed prices established by another order of the Administrator, dated October 20, 1944 (Plaintiff's Exhibit 6A; Plaintiff's Appendix B. P. 3a), three months after the action was commenced.

It was for a violation of this order—an order issued long after the sales were made—that the Administrator sought treble damages in this penal action.

All commodities manufactured by Royal up to and including the period covered by this complaint were governed by the General Maximum Price Regulation issued by the Administrator. This regulation does not set specific dollar-and-cents maximum prices for all sellers selling the same commodities. It is rather a freeze regulation, restricting each seller to the highest prices of commodities sold by him in March of 1942. Realizing, however, that sellers, particularly manufacturers, constantly make new and different commodities, the Administrator provided for the pricing of commodities which he termed "similar" and "comparable", not sold during the base period.

Section 1499.2 of the General Maximum Price Regulation provides, in its applicable provisions, as follows:

> "Except as otherwise provided in this regulation, the sellers maximum price for any commodity or service shall be (a) the highest price charged by the seller during March 1942 (1) For the same commodity or service, or (2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it."

Between May 23, 1943 and June 1, 1944, the section of the General Maximum Price Regulation that pertains to the pricing of comparable commodities provided as follows:

"Section 3 (Section 1499.3). *Maximum prices for commodities and services which cannot be priced under Section 1499.2.* The seller's maximum price for a commodity or service which cannot be priced under Section 1499.2 of this General Maximum Price Regulation *shall be a maximum price in line* with the level of maximum prices established by this General Maximum Price Regulation. *Such price shall be determined by the seller in accordance with the following procedures:*

• • • • • • •

(b) In the case of a sale, other than at wholesale or retail, of a commodity for which a maximum price or pricing method has not been or is not specifically authorized by the Office of Price Administration, (1) The seller (i) shall select a comparable commodity for which a maximum price has been established under Section 1499.2(a) (1) of this regulation; (ii) shall divide his maximum price for the comparable commodity by its current direct cost; and (iii) multiply the percentage so obtained by the current direct cost of the commodity being priced. All customary discounts, trade practices, and practices relating to the payment of transportation charges in effect with respect to the sale of the comparable commodity shall apply to such maximum price.

'Comparable commodity' as used in this subparagraph (1) means a commodity which is made by the same seller, has the same general use and is recognized in the trade or industry as being of the same general type, even though different materials or construction are used, and has a current direct cost varying by not more than fifty per cent from the current direct cost of the commodity being priced. If more than one commodity can be regarded as comparable, the one whose current direct cost is closest to the current direct

cost of the commodity being priced shall be regarded as the 'comparable commodity.'

'Direct cost' means the sum of direct labor and direct material costs. Direct labor costs shall in no event be computed on wage rates higher than those permitted by law, and direct material costs shall in no event be computed on prices higher than the maximum prices established by the applicable maximum price regulations.

Within ten days after determining a maximum price under this subparagraph (1), the seller shall report such price to the appropriate field office of the Office of Price Administration upon a form, duly filled out, copied from the form contained in Appendix C of this regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration."

During the base period (March 1942) Royal manufactured, among many others, two types of men's shorts, Style No. 469 at a base period price of $3.50 per dozen, the other Style No. 359 at a base period price of $2.87½ per dozen (Plaintiff's Exhibit 10; S. M. P. 119, 121).

These style numbers were constructed of a 60 by 48 or 64 by 60 thread count print cloth, two-button adjustable front (Style No. 469 used ten yards of cloth to the dozen and style No. 359 used nine yards of cloth to the dozen; Plaintiff's Exhibit 10, supra).

Subsequent to the base period, Royal commenced manufacturing two other items (Style Nos. 467 and 259) which were exactly similar to Style Nos. 469 and 359 in every respect except that the new style numbers were made from a print cloth of 44 by 36 construction. (The construction refers to the thread count per square inch of cloth.) In every other respect, including trimmings, buttons, labor, cost and appearance, all four shorts were exactly the same. Royal also commenced manufacturing a Style No. 259(b)

of the same cloth but using eight yards to the dozen (S. M. P. 33, 34).[1]

Thus, Royal's highest ceiling prices charged were:

Style No. 469—$3.50	Style No. 467—$3.15
Style No. 359—$2.87½	Style No. 259—$2.50

These were Royal's proper maximum prices in accordance with the General Maximum Price Regulation at that time. During all the times of Royal's sales there were no other prices for these style numbers. There was therefore no sale by Royal at any time in violation of any maximum price.

While the June 1944 investigation was proceeding (actually soon after its inception), prior to any determination by the Administrator of a price, and without the issuance of any order fixing the price, this action ensued.

On October 20, 1944, three months after this action was commenced, the Administrator issued an order under Section 1499.3(e) (1) of the General Maximum Price Regulation (Plaintiff's Exhibit 6A) entitled "Order No. 112 under Section 1499.3(e) (1) of the General Maximum Price Regulation." *Section 3 (e) (1) became effective and was added to the Regulation on June 1, 1944. (The last sale of Items 259 or 467 proven at the trial occurred on April 13, 1944; S. M. P. 55).* This order was directed to Royal and informed it that the Administrator fixed the price on Style No. 467 (ten yards to the dozen) at $1.60 per dozen, and on Style No. 259 (nine yards to the dozen) at $1.50 per dozen. No price was fixed on Style No. 259(b) (eight yards to the dozen).

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[1] Petitioners are contending in their protest filed with the Administrator that Style Nos. 259, 467 and 259(b) are "similar" in accordance with Section 1499.2 of the General Maximum Price Regulation to Style Nos. 469 and 359. However, because the cost of the raw materials of the new style numbers to petitioners were cheaper than the old, petitioners, in computing the maximum price, passed on this saving to their purchasers and arrived at a price below that as calculated by Section 1499.3(b).

From a reading of the Order it is readily apparent that neither the claimed costs of Royal nor their mathematical computation of their maximum prices were controverted by the Administrator. The sole reason for the confiscatory order price was "the maximum price reported by you is not in line with the level of maximum prices established under the General Maximum Price Regulation".

Thus, whereas, under Royal's correctly computed price it sold Style No. 467 for a maximum of $3.15 per dozen, the Administrator ordered a price of $1.60 per dozen, and whereas Royal sold Style No. 259 at a maximum of $2.50 per dozen, the Administrator ordered a price of $1.50 per dozen.

There was no language in this Order from which even an inference could be drawn that there was any attempt to make these prices retroactive. The Order speaks in futuro only and says:

(Plaintiff's Appendix, P. 4a):

"1. Your maximum selling price to wholesalers and retailers *shall* be established as follows:

Description	*Style No.*	*Authorized Maximum Price*
Men's shorts made of 44 x 36 cotton printed cloth, 10 yards to the dozen, two buttons	467	$1.60 per dozen Terms: 1% 10 days; Net 30 days
Men's shorts made of 44 x 36 cotton printed cloth, 9 yards to the dozen, two buttons	259	$1.50 per dozen Terms: 1% 10 days; Net 30 days"

It was not until May 8, 1945, ten months after the commencement of this action and seven months after the issuance of Order No. 112, that the Administrator for the first time attempted to make the prices fixed in Order No. 112 retroactive. (Plaintiff's Exhibit 6B; Plaintiff's Appendix 5a.)

Assuming the validity of these orders, it is apparent that

if the Administrator had any cause of action it arose ten months after this action was commenced. If this action had come on for trial prior to May 8, 1945, the Administrator would necessarily have been non-suited.

At the trial, the Administrator, in attempting to prove his case against Royal, divided his proof into two parts.

Part 1, proof of thirteen sales in one year of Styles 1810, 1850, 461, 489 and 459(b) resulting in overcharges amounting to $419.05, and

Part 2, proof of sales between July 15, 1943 and April 13, 1944; 3,579½ dozen men's shorts Style No. 467 at $2.90 per dozen, 1,948 dozen of the same style at $3.00 per dozen, and 3,417 dozen of the same style at $3.15 per dozen; 750 dozen men's shorts Style No. 259 at $2.37½ per dozen, and 29,240½ dozen of the same style at $2.50 per dozen; 6,478½ dozen boys' shorts Style No. 259(b) at $2.37½ per dozen, and 950 dozen of the same style at $2.50 per dozen.

To prove all these sales, the Administrator offered in evidence a transcript of Royal's sales invoices which showed the prices at which Royal sold these items. (Plaintiff's Exhibit 3; S. M. P. 55.)

To prove the maximum prices of these items, the Administrator, as to Part 1, offered in evidence Royal's base period statement which reflected these prices. (Plaintiff's Exhibit 1; S. M. P. 11.)

To prove the maximum prices of the balance of the items the Administrator, as to Part 2, offered in evidence Order No. 112 under Section 3(e)(1) of the General Maximum Price Regulation *(P. 3a, Plaintiff's Appendix, and Amendment No. 1 thereto; P. 5a, Plaintiff's Appendix)* issued by the Administrator some ten months after this action was commenced. This was the sole proof offered by the Administrator. After the Administrator had rested, Royal moved to dismiss. The Trial Court reserved decision. Royal then

rested. The Trial Court, in its decision, ruled that Royal, as to Part 1, had sold these commodities at prices in excess of the maximum prices. The Trial Court permitted no recovery as to any other item.

The Circuit Court of Appeals ruled that the Trial Court had erred in refusing to allow recovery as to Part 2 of the proof and remanded the cause for further proceedings not inconsistent with its ruling. The Circuit Court further affirmed the judgment against Royal in the sum of $1,257.15.

Errors to Be Urged

The Court below erred:

1. In reversing the judgment of the District Court that the Administrator's complaint did not state a cause of action when filed.

2. In failing to hold that the Administrator's right to recover in this action must be predicated upon facts in existence at the time the complaint was filed.

3. In affirming the judgment of the District Court against Royal in the sum of $1,257.14.

4. In holding that the District Court's judgment that the complaint failed to state a cause of action was in effect a determination that Order No. 112 and Amendment No. 1 thereto were invalid.

5. In failing to hold that Section 925(e) of the Emergency Price Control Act does not authorize the Administrator's treble damage action in a situation such as this where no maximum price has been fixed for a commodity prior to the sale thereof; that if Section 925(e) is so construed as to permit such a penal recovery, the section is unconstitutional and void.

6. In holding that the recovery of treble damages in a penal action for a violation of a regulation when the amount

of damages is to be measured by a maximum price which was not in existence at the time the violation occurred is not in violation of the *ex post facto* provisions of the Constitution.

7. In holding that the *ex post facto* provisions of the Constitution do not apply to this penal action.

8. In failing to hold that the Emergency Price Control Act of 1942, as amended, is unconstitutional and void because it deprives Royal of its property without due process of law, when as in this case it is so construed as to permit the award of penal damages to the Administrator in a situation where, as appears in this record, Royal had no opportunity to challenge in Administrative proceedings an Order issued ten months after the Administrator commenced his suit for penal damages and was barred by the District Court from attacking the validity of the Order at the trial.

Reasons Relied On for the Allowance of the Writ

1. The issues presented in this record and the decision of the Court below, if permitted to stand, opens the door to the general expansion of the novel and unauthorized practice of retroactive administrative determination of private rights. The application of the Emergency Price Control Act by the Administrator to the facts of this case constitute an ingenious and unconstitutional development and expansion of the powers invested in the Administrator by Congress. If permitted to stand, the judgment below may provide a stimulus for application by the Administrator of the same unconstitutional processes to entirely novel situations; since, moreover, the Emergency Price Control Act is applicable to and affects all sections of American industry and manufacture, and since, if the Administrator's conduct in this case and the sanction accorded to it by the Court be-

low are projected into the future, permitting the judgment below to stand, will legalize a widespread administrative encroachment which does violence to the traditional concepts of fair play and to the Constitutional guarantee against deprivation of one's property without due process of law.

2. The decision below is in direct conflict with the decisions of the United States Circuit Court of Appeals for the Fourth Circuit in the cases of *Paul A. Porter, Price Administrator* v. *The Sherwood Distilling Company* and *Paul A. Porter, Price Administrator* v. *Block,* decided May 23, 1946, 156 Fed. Reporter, 2d Series, 264, rehearing denied July 13, 1946. In those cases, the Administrator sought mandatory injunctions requiring the defendants to file applications for maximum prices on certain products sold in 1943, before maximum prices therefor had been established. The Administrator also sought recovery of $296,564.82, or three times the amount by which the aggregate sales prices of the goods sold exceeded the maximum prices which the Administrator alleged he would have approved if the application had been filed and the prices had been established before the sales were made. The action was brought after the defendants had discontinued the sales of the commodities. The Circuit Court of Appeals for the Fourth Circuit affirmed the dismissal of the complaint by the District Court on the ground that the complaint did not state a cause of action. The situation in these cases decided by the Fourth Circuit is identical with the matter here involved. The decisions by the Fourth Circuit are in direct conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit, the review of which is here prayed.

3. The decision below is in direct conflict with the decision in *United States ex rel. Texas Portland Cement Co.* v. *McCord,* 233 U. S. 157, 164, 34 S. Ct. 550, 58 L. Ed. 893; *American Bonding & Trust Co.* v. *Gibson County,* 6 Cir.,

145 F. 871, 874, 7 Ann. Cas. 522; and *Eveland* v. *Detroit Machine Tool Co.*, D. C. E. D. of Michigan, 18 F. 2d 968, 969; *County Court of Marion County, West Virginia* v. *United States*, 53 Ct. Cls. 120; *Kostovich* v. *United States*, 6th Cir., 99 Fed. (2d) 661; *City of Trinidad* v. *Hokasona*, 8th Cir., 178 Fed. 438.

4. The decision below is also in conflict with the decision in *Bowles* v. *Lake Lucerne Plaza, Inc.*, C. C. A. 5th Circuit, 148 F. 2d 967 and *Ambrosia Brewing Co.* v. *Bowles*, decided by the Emergency Court of Appeals, 147 F. 2d 550. These conflicting decisions involve important questions of national scope relating to the administration of Federal statutes and particularly with the right of the Price Administrator to make orders which are in effect legislative and which are in violation of the Constitution of the United States and with the right of the Administrator to make such rules and regulations retroactive, in violation of the Constitution of the United States.

5. The obvious conflict and the importance of the questions involved demonstrate the necessity for review by this Court of the decision below.

Conclusion

It is respectfully submitted that writs of certiorari should issue from this Court to review the judgments of the United States Court of Appeals for the Third Circuit.

JULIUS M. RAPOPORT,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

ARGUMENT

Section 925(e) of the Emergency Price Control Act of 1942, as Amended, Empowering the Administrator to Collect Treble Damages for the Violation of a Price Fixing Regulation, as Applied to the Facts of this Case, Is Unconstitutional in That It Deprives Your Petitioners of Their Property Without Due Process of Law.

A. *The retroactive application by the Administrator of the Maximum Price Regulation to the sales of commodities involved in this case was unreasonable and constituted an infringement of the rights guaranteed to the petitioners by the Fifth Amendment of the United States Constitution.*

It is a well settled principle, reaffirming many times in important precedents by the Supreme Court, that retroactivity is not favored by the "law". *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 42 S. Ct. 325; *Ochoa* v. *Ferendez y Morales,* 230 U. S. 139, 33 S. Ct. 1033. Equally well settled is the rule that if the legislation under which the Administrator acts does not explicitly grant him the power to apply an order retroactively, such power cannot be implied. *Helvering* v. *Reynolds,* 306 U. S. 110, 59 S. Ct. 423; *Arizona Grocery,* 274 U. S. 370, 52 S. Ct. 183.

A reading of the Emergency Price Control Act fails to disclose Congressional intention to grant the power to the Price Administrator to make retroactive orders; it cannot be questioned that the source of the power must derive from Congress; *Social Security Board* v. *Nierkotko,* 66 S. Ct. 637.

Furthermore, the Administrator, conceding that there is no authority in the Act to the effect that he could fix

prices and give them a retroactive effect, stated, in the Statement of Considerations to Amendment No. 54 to the General Maximum Price Regulation, issued May 24, 1943, effective May 29, 1943, 8 F. R. 6962:

> "Adjustments in reported prices may be made by the Office of Price Administration but they will not apply retroactively."

In *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215, a divided Court faced with an order issued by the Wage and Hour Administrator which was in direct conflict with the statute directed him to issue an order in conformity with the statute. Unless such order was issued the statute would be ineffective. In that case the Court was at least equally divided as to whether the Administrator should be directed to issue a corrective order.

B. *Enforcement of the sanction of treble damages by the Administrator in advance of a hearing before the Emergency Court of Appeals deprives your petitioners of their property without due process of law; and the application of the Administrator of such sanctions was an abuse of the permissive discretion prescribed by this Court for the governance of administrators in like situations; Morgan et al.* v. *United States,* 304 U. S. 1; *Wadley Southern Railroad Co.* v. *Georgia,* 235 U. S. 651, 35 S. Ct. 214.

The facts of the instant case are almost tailored to fit the general character of the hypothetical projection of administrative abuse envisaged by this Court in *Yakus* v. *United States,* 321 U. S. 414.

C. *Section 925(e) of the Emergency Price Control Act of 1942 authorizes a treble damage action only if the seller has violated a regulation prescribing a maximum price.*

Concededly, there was no price fixed when the goods were sold nor was one fixed when the action was commenced. If such section is so construed as to permit a treble damage action under these facts such penal action constitutes a deprivation of the petitioners' property without due process of law in violation of the Fifth Amendment of the Constitution. *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Wynne*, 224 U. S. 354, 32 S. Ct. 493; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 40 S. Ct. 338.

D. *The Court below erred in holding that the Administrator's complaint stated a cause of action and that its sufficiency was not dependent upon facts in existence at the time the complaint was filed.*

This ruling is in direct conflict with the rule long established by this Court that the plaintiff's right to recover must depend upon its right at the inception of the action, and the non-existence of a cause of action when the suit was started is a fatal defect which cannot be cured by the accrual of a cause pending suit. (Cf. p. —, *supra.*) This view was sustained by the District Court in its learned opinion (R. 7).

Furthermore, under Section 925(e) of the Emergency Price Control Act this action by the Administrator is purely statutory and must be brought within one year from the date of the occurrence of the violation. The last sale occurred on April 13, 1944. The order of the Administrator upon which any possible cause of action must be based was issued on May 8, 1945, more than one year after the last sale occurred. Thus, in any event, the action is barred

by the statute of limitations. This very question was emphasized by the Court in *Chapman* v. *Griffith Consumers Co.*, 107 F. (2d) 263, by the United States Court of Appeals, District of Columbia.

The ruling of the Court below is also in direct conflict with the case of *Porter, Price Administrator* v. *The Sherwood Distilling Company*, 156 F. (2d) 264, where the Circuit Court of Appeals for the Fourth Circuit dismissed the Administrator's complaint in a situation similar to the case at bar.

Conclusion

This case presents signally important Constitutional issues which germinate out of the vital, and under present governmental processes overspreading, relationships between the Administrative Agent, the private citizen, the Congress and the Constitution.

The searching and fundamental question is presented whether a citizen conducting a lawful business may be required by the Administrator, with the aid of the Congress, to surrender, without first having been accorded a fair hearing in conformity with Constitutional guarantees, his property to the end that the Emergency Price Control Act may be enforced in a manner selected, and at a time chosen, by the Administrator in his sole discretion, and in the exercise of a self-created power, nowhere to be derived from the constituting legislation.

The case presents the further question, important in a world where the pressure of autocratic power continuously erodes democratic processes, whether, when the Administrator reaches out to the limits he has in this case, a new power has not been brought into existence which breaks the structure of powers on which our government rests, and whether such a novel redistribution of powers,

colliding as they do with the Constitution, can be permitted to stand in practice without the people's consent.

Though narrower in compass, the following issues are of equal importance to those above stated, since they are encased within them:

Does the Emergency Price Control Act explicity grant to the Administrator the right to make a retroactive price fixing regulation?

Does it do so by fair implication?

Can the Administrator, in advance of a determination by the Emergency Court of Appeals as to the validity of this retroactive regulation, collect treble damages for the alleged violation thereof?

Finally, we underline the special impact on the petitioners of the fact that unless this Court intervenes, they will have no way by which to prevent or restrain the unconstitutional consequences which must flow from the enforcement of the decree below.

Respectfully submitted,

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